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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MOFFITT, ZWERLING & KEMLER, P.C.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a rule permitting the government by way of a bill of particulars to add funds paid prior to indictment to retain an attorney to an indictment's criminal forfeiture count is inherently unconstitutional.

2. Whether the Comprehensive Forfeiture Act, 21 U.S.C. § 853 *et seq.*, preempts a state law action for conversion founded upon that statute's relation-back provision.

3. Whether the relation-back fiction codified in 21 U.S.C. § 853(c) creates in the government a sufficient property interest in a forfeited asset to satisfy the elements of a common law claim for conversion against a third-party transferee for value.

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PETITION FOR A WRIT OF CERTIORARI

The law firm of Moffitt, Zwerling & Kemler, P.C. ("MZK") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported as *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996) ("*Moffitt V*"); the opinion is set forth in the Petitioner's Appendix ("Pet. App.") at 1a. The pertinent opinions of the United States District Court for the Eastern District of Virginia are reported as *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D. Va. 1994) ("*Moffitt I*"), and *United States v. Moffitt, Zwerling & Kemler, P.C.*, 875 F. Supp. 1190 (E.D. Va. 1995) ("*Moffitt IV*"); these opinions are set forth in the Peti-

tioner's Appendix at, respectively, Pet. App. 124a, and Pet. App. 22a.[1]

JURISDICTION

The Fourth Circuit entered its judgment on May 9, 1996. MZK's petition for rehearing and suggestion for rehearing en banc was denied on June 4, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall be held to answer for a capital, or other otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[1] Related district court opinions in this matter include *In re Moffitt, Zwerling & Kemler, P.C.*, 864 F. Supp. 527 (E.D. Va. 1994) (*"Moffitt II"*), Pet. App. 89a; and *In re Moffitt, Zwerling & Kemler, P.C.*, 875 F. Supp. 1152 (E.D. Va. 1995) (*"Moffitt III"*), Pet. App. 53a.

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 903 of the Comprehensive Forfeiture Act of 1984, 21 U.S.C. §903 *et seq.*, provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

Section 853 of the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853, is set out in full at Pet. App. 170a.

STATEMENT

This case involves the government's tactical efforts to recover from a reputable criminal defense law firm a bona fide legal fee of $103,800 paid prior to indictment by one of its clients who was a target of a federal grand jury narcotics investigation. Months after the fee was paid, first in an original and then in a superseding indictment, the government sought criminal forfeiture of some but not all of the defendant's assets pursuant to the Comprehensive Forfeiture Act, 21 U.S.C. § 853 *et seq.* ("CFA"). Although the government was aware of the amount, manner, and source of the fee payment at least *two* months *prior* to the return of the superseding indictment, the grand jury did not in either indictment specify the funds used to pay the fee as an asset subject to forfeiture.

Both before and after the return of the superseding indictment, the prosecutors negotiated with the law firm and actively litigated pre-trial motions without ever notifying or suggesting to defense counsel that the government intended to make any fee forfeiture claim. Indeed, shortly before the scheduled trial date, at a hearing on a pretrial motion to quash a government trial subpoena of the law firm's fee records and other related documents, the government represented to the court on the record that the government was *not* seeking, and that the indictment did *not* embrace, attorney-fee forfeiture. After the district court quashed the subpoena, the government, in a tactical decision to improve its position on appeal of the order to quash, filed a bill of particulars adding to the forfeiture count the money used pre-indictment to pay the law firm. It also obtained a restraining order preventing the defendant and the law firm from expending what remained of the fee. Shortly thereafter, due to issues injected into the case by the fee forfeiture claim, the law firm was conflicted out of the case.

By the time the restraining order issued, the law firm had spent in the ordinary course of its business the great bulk of the funds received as its fee. After extensive discovery, the court determined that approximately $27,000 of assets traceable to the fee payment remained in the firm's possession. Those assets were ordered forfeited to the government.

Not satisfied with this remedy, the government commenced in federal court a state law action for conversion against the law firm. Under the CFA, upon forfeiture the government's title to forfeited assets relates back to the time of the act giving rise to the forfeiture—in this case, a point in time prior to when the firm received the fee payment. The government therefore claimed that the firm's expenditure of assets to which it retroactively held title under the forfeiture order constituted a tort and that the government was entitled to damages equal to $103,800, the full value of the fee payment, plus pre-judgment interest. Under the CFA, however, the "lost value" of for-

feited property that is expended, transferred, or consumed prior to the forfeiture order may only be recovered in the form of substitute assets to be seized from criminal defendants, but not from third parties. Thus, although unable under the CFA to recover the full value of the fee payment, the government sought an equivalent result by resort to a common law action drawing upon the CFA's relation-back provision.

This case squarely poses the important federal question whether the government can use a post-indictment bill of particulars to add an attorney's fee, paid prior to indictment, to a criminal forfeiture count when the grand jury has failed in the indictment to specify the funds used to pay the fee as a forfeitable asset of the defendant. Both the district court and the Court of Appeals held that the bill of particulars was a constitutionally adequate substitute for the probable cause scrutiny of the grand jury even when the asset at issue had been used to retain counsel.

This decision of the Fourth Circuit conflicts with reasoning underlying this Court's decisions in *United States v. Monstanto*, 491 U.S. 600, 109 S. Ct. 2657 (1989), and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646 (1989), and is inconsistent with decisions of the Second, Third, Seventh, Eighth, and Ninth Circuits.[2] Indeed, the procedure sanctioned here for federal criminal forfeiture proceedings appears to be the very type of "rule that is inherently unconstitutional" proscribed by this Court in *Caplin*, 491 U.S. at 634, 109 S. Ct. at 2657.

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[2] *See United States v. Michelle's Lounge*, 39 F.3d 684, 691, 695 (7th Cir. 1994) (due process requires adversary hearing on probable cause for forfeiture if the government has seized assets needed to retain counsel); *United States v. Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), *cert. denied*, 502 U.S. 943, 112 S. Ct. 382 (1991) (same); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985) (same); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.) (same), *cert. denied*, 474 U.S. 994, 106 S. Ct. 406 (1985); *United States v. Long*, 654 F.2d 911, 915-16 (3d Cir. 1981) (same).

This federal question is important because the rule endorsed here by the Fourth Circuit deprives a criminal defendant, without any process whatsoever, of the right to retain counsel using property not yet adjudged forfeitable or even claimed to be forfeitable; removes the neutral check of a grand jury or court finding of probable cause; and seriously tilts the adversarial balance between prosecution and defense by allowing the government to introduce without any neutral check a disqualifying conflict between the criminal defendant and his counsel at any time. In a "mixed-asset" case such as this one, where the indictment does not seek all a defendant's assets, and, indeed, does not seek other assets transferred for adequate consideration prior to indictment, the Fourth Circuit's rule devastates an otherwise valid, lawful attorney-client relationship.

The second and third important federal questions presented in this petition arise from the government's attempt to use a common law conversion action to circumvent the statutory constraints imposed by the CFA. Without the benefit of the CFA's relation-back provision, the government could not establish the two elements of conversion under Virginia law—1) the government's immediate right to possess the fee at the time it was paid to the firm, and 2) the law firm's wrongful exercise of dominion over that fee. *See United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305, 440 S.E.2d 902, 905 (1994). Before the forfeiture order was entered, it is undisputed that the criminal defendant owned the money he used to pay the fee and that the firm in turn was authorized to expend the money it received. Thus, the government may state a claim for conversion only if the operation of the relation-back fiction, by retroactively vesting title in the government at a point prior to the time when the law firm was paid, transforms that lawful receipt of payment into a wrongful interference with the government's then immediate right to possess that money.

The CFA, however, does not allow the government to recover substitute assets in the form of monetary damages

from third-party transferees. The district court therefore rejected on preemption grounds the government's conversion claim, holding that the government could not avoid the CFA's express limitation on the substitute asset remedy by seeking equivalent results by means of a tort action itself dependent on the CFA. The Fourth Circuit reversed, holding that the statutory limits upon the government's power to forfeit substitute assets do not preempt state law actions—even those predicated solely upon the relation-back provision of the applicable forfeiture statute—that achieve recovery of substitute assets from third parties.

The resolution of the preemption question is important to establish the reach of the government's forfeiture power. The government conceded below that the CFA does not authorize the pursuit of substitute assets from a third-party transferee for value such as the law firm. Nonetheless, the Fourth Circuit's rule allows the government to selectively incorporate one part of the CFA into a state law action—"cherry-picking" the relation-back provision—to expand its powers to achieve that very goal. The Fourth Circuit's reasoning in this respect is inconsistent with the preemption analysis set out by this Court in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270 (1990) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984), and relies in part upon an interpretation of 21 U.S.C. § 903 that is at odds with the interpretation of that statutory provision by the Third, Fifth, and Eleventh Circuits.[a]

The final, and related, question of federal law is whether the relation-back fiction codified in § 853(c) of the CFA creates in the government a sufficient property interest in the forfeited asset to satisfy the two elements of a common law claim for conversion. The Fourth Cir-

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[a] *See United States v. Stazola*, 893 F.2d 34, 38 (3d Cir. 1990); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1218 (5th Cir. 1991); *United States v. Lot 5*, 23 F.3d 359, 363 & n.8 (11th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 722 (1995).

cuit was untroubled by its counterintuitive conclusions that 1) the firm's then lawful expenditure of the fee was somehow transformed, after the fact, into a tort; and 2) a retroactive right to title also embraced a retroactive immediate right to possession. This decision conflicts with this Court's prior interpretations of the common law and statutory relation-back fictions in *United States v. 92 Buena Vista Avenue*, 507 U.S. 111, 113 S. Ct. 1126 (1993) ("*Buena Vista*"), and in *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806), and is inconsistent with the reasoning adopted by the Ninth Circuit in *CHoPP Computer Corp. v. United States*, 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, —— U.S. ——, 115 S. Ct. 63 (1994).

As this Court has recognized, criminal forfeiture can be a "devastating" weapon. *See Caplin*, 491 U.S. at 634, 109 S. Ct. at 2657. Congress therefore placed strict constraints upon the scope of the government's forfeiture authority with respect to third parties who have committed no crime. Perhaps the most significant such protection, codified at 21 U.S.C. § 853(p), is the express limitation upon the government's ability to seek substitute assets, including monetary damages, to replace the "lost value" of forfeitable assets that have been consumed or transferred by the defendant: the statute authorizes the government to seek such "replacement value" *solely* from criminal defendants. The government's conversion action plainly attempts to go further than the CFA permits so as to recover substitute assets from third-party transferees for value and criminal defendants alike. This attempted aggrandizement of the government's ability to pursue forfeitable assets threatens the settled property expectations of countless third-party transferees for value, who now potentially face retroactive tort liability for the lawful (at the time) receipt and use of assets later ordered forfeited.

BACKGROUND

Moffitt, Zwerling & Kemler, P.C. ("MZK") is a well-known and reputable criminal defense firm located in Alexandria, Virginia. In late August 1991, William Paul

Covington met with two MZK partners and retained the firm to represent him with regard to an ongoing investigation by federal prosecutors into illegal drug activity. Covington, a target of the grand jury investigation, owned and ran two legitimate businesses: an auto repair service and a towing service. Covington and MZK agreed on a $100,000 fee, which he paid in cash on August 22 and 23, 1991. An additional $3,800 was held by the firm for costs and disbursements. MZK then timely filed an IRS Form 8300 report reflecting the two cash payments but, upon Covington's request, did not disclose his identity on the IRS form.

A multi-count indictment was returned on October 30, 1991, naming Covington and eight co-defendants. The indictment included a forfeiture count identifying twelve categories of assets as potentially forfeitable under 21 U.S.C. § 853. The cash used to pay MZK's fee was not identified in the indictment, although other specific items of cash were included; nor did the forfeiture count seek all of Covington's assets. The indictment did contain a general boilerplate "catchall" clause seeking forfeiture of all properties constituting proceeds of the illegal drug activity or used to facilitate the drug offenses. In November 1991, from two separate witnesses (in addition to the filed Form 8300), the government learned of the facts and circumstances surrounding the cash fee paid by Covington to MZK.[4] *See* Pet. App. 205a-06a. The grand jury returned a superseding indictment on January 9, 1992. The superseding indictment contained a forfeiture count identical to that in the original indictment. The cash used to pay MZK's fee was again not specified.

On February 11, 1992, the government served on MZK a trial subpoena duces tecum for the law firm's fee records relating to its representation of Covington. On

[4] In December 1991, the law firm filed numerous pre-trial motions on behalf of Covington, including a motion for a bill of particulars. The government successfully opposed that motion on the ground that the indictment was "drawn . . . sufficiently specific and complete." Pet. App. 184a.

March 13, 1992, the district court quashed the subpoena and rejected the government's argument that the fee information constituted evidence of "unexplained cash" assets that was admissible at trial to establish Covington's illegal drug activities.[5] The court had specifically questioned the government on the record concerning the timing of its actions and the relevance of the fee to the indictment. The prosecutor responded (i) that the fee was *not* the subject of any count in the indictment; and (ii) that the government was *not* seeking criminal forfeiture of the fee. *See* Pet. App. 185a-87a.

In a tactical move to strengthen its position on appeal of the trial court's order quashing the trial subpoena for the law firm's fee records, the prosecutors on March 16, 1992, wrote the Department of Justice Asset Forfeiture Office seeking approval of fee forfeiture. The prosecutors expressly stated they were seeking fee-forfeiture approval to bolster the government's position on appeal of the order quashing the subpoena:

> [If this request is approved,] the United States will seek reconsideration of [Judge Bryan's] ruling in light of the forfeiture of the fees themselves as reflected in the Bill of Particulars [we will file]. Alternatively, the United States will seek an interlocutory appeal to the Fourth Circuit Court of Appeals of the court's granting the motion to quash. In that context the decision to forfeit the fees will similarly provide a consistent position for the United States.

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[5] On February 11, 1992, the government served on the law firm a letter threatening felony tax prosecution of the firm, its principals, and Covington for having withheld client-identifying information from the Form 8300 filed five months earlier. District Judge Bryan urged the government to voluntarily withdraw its threatening letter (which it did) because: "regardless of actual motives, the perception that arises from the timing of it is damning it seems to me, to the United States Attorney's Office. The idea that you threaten a lawyer with prosecution a few weeks before trial in which he is involved, it looks like, whatever you meant, that you are trying to drive that lawyer out of the case." Pet. App. 208a.

Pet. App. 210a. The government received approval to seek fee forfeiture and on May 12, 1992, filed a bill of particulars seeking criminal forfeiture of the $103,800 paid to MZK. The next day the district court entered a qualified restraining order, which extended only to such portion of the original $103,800 as remained segregated and preserved at that late date—roughly $3,700. The remainder had been expended by MZK either to pay the costs of Covington's representation or had been earned by MZK as compensation for that representation and spent in the ordinary course of the law firm's business.

In August 1992, as a result of issues arising from injection of the fee issue into the case, the district court disqualified MZK from the case. New counsel was then appointed and Covington subsequently pleaded guilty and consented to the forfeiture of those of his assets identified by the superseding indictment and the bill of particulars. On March 1, 1993, the district court entered a supplemental consent order forfeiting the $103,800 paid by Covington to MZK.

On April 12, 1993, MZK filed a petition pursuant to 21 U.S.C. § 853(n) seeking to modify the forfeiture order so as to establish its interest in the fee. MZK also argued that the forfeiture proceeding was procedurally flawed because, *inter alia*, the fee had not been specified in either indictment but had instead been added to the case by way of the bill of particulars. After a two-day hearing in July 1993, the district court issued an opinion rejecting both the firm's petition and its challenge to the procedure used to inject fee forfeiture into the criminal case. *See Moffitt I*, Pet. App. 124a.

On February 28, 1994, the government moved the district court to issue an order directing the law firm to remit the full $103,800 fee paid by Covington. The district court rejected this request, holding that the government could recover from MZK only such assets as were "traceable" to the forfeited fee because § 853(p) authorized the government to recover the lost value of consumed

forfeited property only by seeking substitute assets from criminal defendants. *See Moffitt II*, Pet. App. 119a-123a. The government did not appeal this decision. Discovery then began to identify those assets in MZK's possession that were "traceable" to the forfeited fee. *See Moffitt III*, Pet. App. 53a. On February 17, 1995, the district court issued a final order directing forfeiture of approximately $27,000 that it found to be "traceable" to the original fee. MZK did not appeal this order.

On October 21, 1994, while statutory forfeiture proceedings against MZK were ongoing, the government brought in the district court a Virginia common law action for conversion and detinue seeking damages for MZK's allegedly wrongful possession and disposition of the forfeited fee. The district court held that the CFA preempted such actions within the criminal forfeiture context. *See Moffitt IV*, Pet. App. 22a.

The government appealed to the Fourth Circuit, *inter alia*, the district court's decision in *Moffitt IV* holding the government's common law conversion action to be preempted. MZK cross-appealed the district court's decision in *Moffitt I* rejecting its § 853(n) petition and upholding the belated use of the bill of particulars. These actions were consolidated for purposes of appeal.

The Fourth Circuit reversed in part and affirmed in part. *First*, although it recognized that the forfeiture count of the indictment did not specify the funds used to pay the fee, the court held that a "catchall" clause and a reference to cash "not yet accounted for" sufficed to identify the fee asset as potentially subject to forfeiture. *Moffitt V*, Pet. App. 5a-7a. *Second*, drawing primarily upon this Court's opinion in *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), the court rejected the district court's preemption holding and found no reason to conclude that the passage of the CFA was intended to abridge the government's "long-standing" right to bring a conversion action. *Moffitt V*, Pet. App. 11a-16a. Disregarding contrary precedent from the Third,

Fifth, and Eleventh Circuits, the Fourth Circuit reinforced its conclusion by reference to 21 U.S.C. § 903. *Id.* at 17a. *Third*, the court held that the relation-back fiction retroactively created an immediate right to possession arising prior to the time the fee was paid so that the government could state the elements of a common law conversion claim. *Id.* at 17a-18a.

By order dated August 9, 1996, the district court granted summary judgment in favor of the government on its claim for conversion.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction over the forfeiture action was pursuant to 18 U.S.C. § 3231 and 21 U.S.C. § 853(l) and over the conversion action was pursuant to 28 U.S.C. § 1345.

REASONS FOR GRANTING THE PETITION

I. APPROVING THE GOVERNMENT'S TACTICAL USE OF A BILL OF PARTICULARS TO ADD FORFEITURE OF AN ATTORNEY'S FEE TO A PENDING CRIMINAL CASE CONSTITUTES AN "INHERENTLY UNCONSTITUTIONAL RULE."

The rule approved by the Fourth Circuit permitting the government unilaterally by way of bill of particulars to inject attorney fee forfeiture into criminal cases at the post-indictment/pre-trial stage is an "inherently unconsitutional rule" that undermines the adversary process protected by the Fifth and Sixth Amendments. The government's position below was that § 853 entitles it to forfeit assets used to retain counsel even if the specific items to be forfeited are not approved for forfeiture by a grand jury and included in the forfeiture count in the indictment and thus are not subjected to probable cause scrutiny. There is no dispute that the forfeiture counts at issue in this case did not specifically identify the fee paid to MZK as subject to forfeiture. Indeed, the government acknowledged to the district court that the fee was not included in the forfeiture count, *see supra* p. 10, and the Fourth Circuit recognized that "the government first

specifically identified the $103,800 fee as subject to forfeiture in a bill of particulars filed after the superseding indictment." *Moffitt V*, Pet. App. 6a-7a. Despite this, the Fourth Circuit concluded that it was constitutionally permissible for the government unilaterally to add the fee asset to the forfeiture count long after the indictment and restrain the fee asset prior to trial because the government had included a boilerplate "catchall" provision in the forfeiture count. *Id.*

But this was a "mixed assets" case. The defendant operated two legitimate businesses, from one of which he derived substantial income. The boilerplate "catchall" clause in the forfeiture count did not seek to forfeit all of Covington's assets (as did the forfeiture count in *Caplin*), but instead sought solely forfeiture of illegal proceeds or their derivatives, and of any assets used to commit or facilitate the alleged offenses.

The Fourth Circuit's rule allows prosecutors, even in "mixed assets" cases, to forfeit fees paid to attorneys prior to indictment or restraining order; to restrain such fees before the defendant is actually tried; to do so without any prior warning to the counsel who have been and are actively engaged in expending substantial time and resources in contesting the government's charges and providing a defense; and all without any independent check on the prosecutor's power by judge or grand jury. Under this rule, any indictment containing a general forfeiture count can be unilaterally manipulated by the prosecution's belated use of a bill of particulars so as to achieve the desired tactical objective of driving selected defense counsel out of the case. This rule therefore undermines the adversary process protected by the Fifth and Sixth Amendments in the following ways:

First, the rule gives the government improper "veto" power over who its adversaries will be. To target a fee for forfeiture after the return of the indictment will almost inevitably result (as it did here) in disqualification of defense counsel on conflict grounds. If the government can file a bill of particulars without the grand jury's prob-

able cause scrutiny, and without an independent probable cause finding by the court, the prosecutor can control whether and when a disqualifying conflict is injected into the criminal case, and can thereby effectively determine who will (not) represent a defendant.

Second, the rule permits the government to use forfeiture as a tactical weapon in the criminal contest—a use that is plainly improper. *See United States v. Nichols*, 841 F.2d 1485, 1508 (10th Cir. 1988) (tactical use of forfeiture "would undermine the balance necessary to the adversary system"). The facts of this case illustrate the harm to the adversary process that is caused by tactical use of the forfeiture power. It is undisputed that:

> (i) the government had information regarding details of MZK's fee as early as November 1991 (Pet. App. 205a-06a);
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> (ii) it continued to litigate pre-trial motions and plea bargain with MZK for several months without providing any notice to Covington or MZK that it believed the fee was subject to forfeiture;
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> (iii) it failed to investigate the tainted fee allegation through the grand jury that returned the superseding indictment in January 1992;
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> (iv) only after MZK rejected the government's final plea offer, and noticed its intent to rely on an insanity defense, did the government—on the eve of the scheduled trial date—first raise the fee issue with a trial subpoena for fee records;
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> (v) at the hearing on the law firm's motion to quash the subpoena, the prosecutor stated, in response to Judge Bryan's questions, that the monies paid the law firm were not a subject of any count in the indictment, and that the government was not pursuing fee forfeiture (Pet. App. 185a-87a);
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> (vi) after Judge Bryan quashed the trial subpoena, the prosecutors made a tactical decision to seek approval from the Department of Justice for fee forfeiture to improve the government's chance of prevailing on its appeal of Judge Bryan's ruling (Pet. App. 210a);

(vii) after securing approval, the government unilaterally by filing a bill of particulars added MZK's fee to the indictment without a grand jury or a trial court finding of probable cause to believe the funds used to pay the fee were connected to the crimes charged in the criminal case; and

(viii) these governmental actions (which the district court noted "reasonable people" could view as an attempt "to drive the law firm out of the case" (Pet. App. 211a)) ultimately resulted in the MZK firm's disqualification from its representation of Covington.

Third, the rule undermines the statutory provisions that expressly protect a third-party transferee's right to prior notice of forfeiture. *See, e.g.*, 21 U.S.C. § 853(e)(1)(B) (requiring notice to third parties before a court may enter a pre-indictment protective order); *see also* 21 U.S.C. § 853(e)(1)(A). Lack of notice is especially prejudicial in a case such as this where the government allowed the third party to render substantial services to the defendant in exchange for that asset despite its belief that the asset might in fact be forfeitable.[6]

This rule unfairly allows prosecutors to turn criminal forfeiture, a weapon designed by Congress to serve solely as additional *in personam* punishment against convicted criminal defendants, into a proceeding that punishes innocent criminal defense attorneys who have rendered substantial legal services and thus have paid good value for the forfeited fee.[7] Such an inherently unconstitutional rule

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[6] The legislative history indicates that Congress agreed with the requirements in Fed. R. Civ. P. 7(c)(2) and 31(e) that forfeiture claims be specifically identified in the indictment and that the jury render a special verdict. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 193-94 & n.15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3376-77 & n.15 (*"Senate Report"*); *see also United States v. Pelullo*, 14 F.3d 881, 904 (3d Cir. 1994).

[7] Indeed, as part of Covington's plea bargain, the government offered to recommend a sentence reduction in exchange for his "unstinting efforts" to aid it in its forfeiture efforts against his counsel. *See In re Phillips, Beckwith & Hall*, 896 F. Supp. 553 (E.D. Va. 1995) (describing plea agreement in exchange for

is at odds with the reasoning underlying this Court's decisions in *Caplin* and *Monsanto* and violates the Fifth and Sixth Amendment rights of criminal defendants and the Fifth Amendment rights of defense attorneys and other third-party transferees for value.[8] It is inconsistent as well with decisions by the Second, Third, Seventh, Eighth, and Ninth Circuits. *See supra* n.2.

A. This Court's Seminal Attorney Fee Forfeiture Cases—*Caplin* and *Monsanto*—Presume the Government Will Specify the Fee Asset in the Indictment for Probable Cause Scrutiny by the Grand Jury.

This Court held in *Caplin* and *Monsanto* that "neither the Fifth nor Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees." *See, e.g., Monsanto*, 491 U.S. at 614, 109 S. Ct. at 2666. The Court recognized, however, that "freezing the assets in question before [a criminal defendant] is convicted—and before they are finally adjudged to be forfeitable—raises distinct constitutional concerns." 491 U.S. at 615, 109 S. Ct. at 2666. And in *Caplin* this Court warned that attorney fee forfeiture could be unconstitutional in "specific cases of prosecutorial misconduct . . . or when [a challenge is] directed to a rule that is inherently unconstitutional." 491 U.S. at 634, 109 S. Ct. at 2657.

The CFA provides that, based upon the indictment, the government can obtain a restraining order preventing the

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Covington's cooperation as chief witness against his counsel). Moreover, while the government has zealously pursued forfeiture from MZK, it has agreed to return some assets to Covington notwithstanding its power under § 853(p) to seek substitute assets from Covington. *See Moffitt III*, Pet. App. 64a-65a.

[8] *United States v. Strissel*, 920 F.2d 1162, 1166 (4th Cir. 1990), and *United States v. Grammatikos*, 633 F.2d 1013, 1024-25 (2d Cir. 1980), offer no support for the conclusion that a bill of particulars can be used to add assets to an indictment without probable cause review. Those cases merely hold that a bill of particulars can be used to "pinpoint" assets already identified or embraced by an indictment.

defendant from using assets named in the forfeiture count to pay counsel. *See* 21 U.S.C. § 853(e)(1)(A). Such pre-trial removal of the presumptively-innocent defendant's control over his assets clearly is a deprivation of property. *See United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (en banc), *cert. denied*, 502 U.S. 943, 112 S. Ct. 382 (1991). That deprivation is of even greater concern where the defendant is prevented prior to trial from using his assets to retain counsel to defend himself from the very allegations which provide the basis for the restraining order. *Id.* at 1193. Such deprivation is constitutional, therefore, only where the fee asset has been specified in the indictment and thereby subjected to at least the minimal, neutral check of the grand jury's probable cause scrutiny. *See Monsanto*, 491 U.S. at 615, 616, 109 S. Ct. at 2667.

This Court's statement in *Caplin* that "any assets which the Government wishes to have forfeited must be *specified* in the indictment," *Caplin*, 491 U.S. at 632 n.10, 109 S. Ct. at 2656 n.10 (emphasis added), is not a throw away, as the Fourth Circuit's rule would make it, but a constitutional necessity. By allowing the government to rely on a nonspecific "catchall," the Fourth Circuit removed the only neutral check preventing a presumptively-innocent defendant from being deprived without due process of his property and his right to use his property to retain counsel of his choice.

B. The "Catchall" Provision Relied On By the Fourth Circuit Allows the Government to Avoid Neutral Probable Cause Scrutiny of the Fee Assets and Conflicts with Decisions of Other Circuits.

The catchall included in the forfeiture count identified as forfeitable:

> all properties constituting, or derived from proceeds the defendants obtained, directly or indirectly, as a result of a conspiracy and any properties used, or intended to be used by the defendants in any manner or part, to commit, or to facilitate the commission of such violation.

Pet. App. 182a. The district court correctly described it as "a general allegation [that] doesn't focus on any specific fund, and certainly not on legal fees." Pet. App. 192a. At most the provision "sought forfeiture of all the proceeds of Covington's criminal activity." *Moffitt V*, Pet. App. 5a-6a. It did not require the grand jury to determine that there was probable cause to believe any *particular* asset was subject to forfeiture, nor did it require the grand jury to determine there was probable cause to believe that *all* the defendant's assets were forfeitable. In contrast, the provision used in the *Caplin* indictment required the grand jury to find probable cause that *all* of the defendant's assets were tainted. *See* Pet. App. 201a.

This boilerplate provision provides no meaningful protection against the deprivation of important constitutional protections at the most critical stages of a criminal prosecution. At best it is a meaningless truism, requiring only a finding that all assets that are forfeitable are subject to forfeiture. *See United States v. Amend*, 791 F.2d 1120, 1128-29 (4th Cir.) (criticizing special forfeiture verdict form for employing similarly "tautologous" language), *cert. denied*, 479 U.S. 930, 107 S. Ct. 399 (1986). To allow the government to rely on this boilerplate catchall is to allow the government to bypass altogether any check on its ability to prevent a presumptively-innocent defendant's use of his property to retain counsel of his choice. A specific probable cause finding by the grand jury is scant enough protection from the deprivation of fundamental constitutional rights; reliance on such an imprecise catchall provision is no protection at all.[9]

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[9] The Fourth Circuit pointed out that the forfeiture count identifies $168,000 in cash as subject to forfeiture. *See Moffitt V*, Pet. App. 6a. But there is no dispute that the $168,000 in cash refers to specific cash other than that paid to MZK. The $168,000 was made up of other assets, specifically money spent by Covington on alimony, entertainment, jewelry, and cars. *See* Pet. App. 189a-90a. The government presented evidence of the $168,000 to the grand jury in October 1991, but did not receive details of the fee payment until November 1991. Indeed, the government represented to the district court in March 1992 that the fee was *not* the subject of

The Fourth Circuit's reliance on the catchall provision stands in stark contrast to the procedural protections required by other Courts of Appeals where the government seeks to forfeit assets to be used to retain counsel. Because the only source of certainty that the fee asset is probably the proceeds of criminal activity is the indictment itself, and the indictment emerges from a nonadversarial process, the Second Circuit, sitting *en banc*, has held that a criminal defendant has a legitimate interest in ensuring that probable cause is adequately established at a pretrial hearing before he is effectively deprived of counsel of choice as a result of a pre-trial restraint of his assets. *Monsanto*, 924 F.2d at 1195. That court ruled, therefore, that the Fifth and Sixth Amendments require an adversary pre-trial hearing as to probable cause that the defendant committed the crimes that provide the basis for forfeiture and that the properties specified as forfeitable in the indictment are properly forfeitable. *Id.* at 1203. Importantly, at such a hearing the grand jury's probable cause determination as to the forfeitability of the specified assets may be reconsidered by the court. *Id.* The Third, Seventh, Eighth, and Ninth Circuits have reached the same conclusion. *See supra* n.2. Thus, in at least five circuits a criminal defendant is entitled to a pre-trial adversarial hearing at which the grand jury's *ex parte* finding that there is probable cause to believe the fee asset is subject to forfeiture can be reconsidered. In the Fourth Circuit, however, the government need not present the fee asset to the grand jury at all.

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any count in the indictment (Pet. App. 185a); and that it was *not* seeking criminal forfeiture of the fee (Pet. App. 186a). Moreover, the fee asset is described in the bill of particulars as an *additional* asset to be *added* to the forfeiture count. The bill of particulars adds the fee asset as item "number 13" to the twelve item list of forfeitable assets that still contained the $168,000 as item "number 5." *Compare* Pet. App. 183a *with* 191a.

II. THE PROPER INTERPRETATION OF THE PREEMPTIVE EFFECT OF SECTION 853 IS A QUESTION OF SUBSTANTIAL IMPORTANCE.

The CFA dramatically expanded the efficacy of criminal forfeiture by incorporating for the first time in this nation's history the relation-back fiction traditionally used in civil forfeiture into the statutory criminal forfeiture framework so as to forestall criminal defendants from shielding assets by simply transferring them. *See* 21 U.S.C. § 853(c); *Senate Report*, 1984 U.S.C.C.A.N. at 3374-81, 3383-84, 3394. Congress simultaneously acted to further limit the extent to which criminal defendants could obstruct the recovery of forfeitable property by authorizing the government to obtain the full value of forfeited property through the seizure of substitute assets where the original forfeited property is beyond the reach of the statutory scheme. *See* 21 U.S.C. § 853(p); *Senate Report*, 1984 U.S.C.C.A.N. at 3384-85, 3395. Significantly however, Congress did not grant the government license to pursue substitute assets from any third party who might have possessed forfeitable property. The express terms of § 853(p) allow the government to seek substitute assets only from criminal defendants. Indeed, the Senate Report indicates Congress anticipated that § 853(p) would be used in conjunction with § 853(c) to mitigate the effect of forfeiture upon third-party transferees. *See Senate Report*, 1984 U.S.C.C.A.N. 3182, 3384 & nn. 29, 30.

The question raised by this case is whether the government may nonetheless pursue substitute assets (here, monetary damages) from innocent third-party transferees by means of a state law conversion action that itself incorporates the federal statutory relation-back provision. The government here quite candidly conceded before the district court that it brought this conversion action against MZK in an effort to circumvent the express limitation of § 853(p) to criminal defendants. *See Moffitt IV*, Pet. App. 46a. The government chafed at this constraint in the forfeiture statute and consciously sought to act in derogation of its statutory powers to achieve through

the common law a result not authorized by Congress—the extraction from MZK of substitute assets in the form of monetary damages equal to the full $103,800 forfeited from Covington.

The government chose well in its bid to evade the CFA's limits upon its statutory forfeiture powers. Common law conversion offers few defenses: lack of knowledge, intent, or motive does not defeat the claim if a defendant has exercised dominion over property to which plaintiff held an immediate right of possession. 18 Am. Jur. 2d Conversion § 3, at 147-48 (1985); *see also Universal C.I.T. Credit Corp. v. Kaplan,* 198 Va. 67, 76, 92 S.E.2d 359, 365 (1956) (good faith is not a defense to conversion). Potential liability in conversion, moreover, does not end with an initial transferee, but cascades down the chain of title to reach any individual—even a bona fide purchaser for value—who holds or has transferred the plaintiff's property.

The government, of course, could not state a *pure* common law conversion claim. It plainly did not have an immediate right to possess the forfeited fee prior to the entry of the order of forfeiture. *See United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 127, 113 S. Ct. 1126, 1136 (1993) ("Until the Government [wins a judgment of forfeiture], someone else owns the property."). It is only by selectively "cherry-picking" the relation-back fiction from the statutory criminal forfeiture scheme—ignoring the accompanying protections against and limitations upon such forfeiture—that the government can even hope to state a claim for conversion.

The resulting hybrid cause of action—common law conversion plus statutory relation-back minus statutory defenses and limitations—radically expands the range of assets potentially susceptible to government forfeiture. Through the operation of the relation-back fiction, state law conversion could now impose liability against any third party who has possessed or transferred any identifi-

able asset covered by a forfeiture order.[10] Unlike the statutory scheme, third-party transferees like MZK would be liable in conversion for the full value of forfeitable assets partially expended or consumed in the ordinary course of business. Unlike the statutory scheme, the government could seek damages from innocent third-party transferees who have transferred assets prior to the initiation of forfeiture proceedings and who therefore have no incentive, and potentially no ability, to file a § 853(n) petition. Unlike the statutory scheme, the government could bring a conversion action to recover lost rents for use of an asset in addition to obtaining the asset itself through forfeiture.

No evidence exists to support the conclusion that Congress intended the government to wield such supra-statutory powers. Neither the CFA itself nor the legislative history found in the Senate Report speaks to this question. In passing the CFA, Congress did not legislate against a common law backdrop where forfeitable assets were pursued through conversion. Research by counsel has revealed not one case since *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806) (Marshall, C.J.), in which the government has attempted to bring a conversion action to further its pursuit of forfeitable property. In *Grundy*, as discussed in more detail at Part III *infra*, Chief Justice Marshall rejected the attempt as inconsistent with the relation-back fiction. No state law conversion action could in any event have been brought as an adjunct to a criminal forfeiture prior to the incorporation of the federal relation-back fiction into the criminal forfeiture framework. Thus, the question is whether the CFA inadvertently imbued the government with a reach far longer than is authorized by its own provisions, or whether, instead, the CFA preempts state

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[10] Indeed, if the government forfeits a car, and that car was wrecked by a third-party transferee before the forfeiture order was entered, the Fourth Circuit's decision allows the government to sue that third party for damages.

law in this context so as to restrain the government from overreaching its statutory limits.

The district court, applying the preemption standards set out in *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 2275 (1990), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 621 (1984), concluded that the conflict between the statutory framework and the results achievable by way of a conversion action was too great to allow a hybrid action because the government's use of state law " 'stands as an obstacle to the accomplishment of the full purposes and objectives' of Congress's carefully crafted forfeiture scheme." *Moffitt IV*, Pet. App. 44a-46a (citations omitted). The Fourth Circuit disagreed. Drawing upon this Court's holding in *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), and looking exclusively to the nominal cause of action pleaded by the government, the Fourth Circuit framed its preemption analysis as an affirmation of the government's "long-standing" right to bring an action in conversion. Starting from the familiar principles that "federal statutes do not, by implication, abrogate the government's right to bring common law suits," *see Moffitt V*, Pet. App. 11a, and that Congress is assumed to act without an intent to supplant state law, *see id.* at 14a, the Fourth Circuit reasoned that the absence from § 853 of any mention of a state law conversion action undercut any inference of preemption that might arise from the express limitation of § 853(p).

The Fourth Circuit supported its conclusion by reference to 21 U.S.C. § 903, which disavows a congressional intent to preempt state drug laws in the absence of a positive conflict between state and federal law. *See Moffitt V*, Pet. App. 17a. This broad interpretation of § 903, however, creates a conflict with the precedents of the Third, Fifth, and Eleventh Circuits, which hold § 903 to be "directed only to state laws controlling drug abuse and enforcement," *Stazola*, 893 F.2d at 38—a category of actions that certainly does not embrace a common law action for conversion. *See supra* n.3.

Texas, in any event, is inapposite to this case. The Debt Collection Act analyzed in *Texas* imposed upon individuals, but not states, a liability for prejudgment interest that was more onerous than the common law. *See* 507 U.S. at 536, 113 S. Ct. at 1635. This Court concluded, reasonably enough, that in so strengthening the government's rights against individuals—the expressly identified target of the legislation—Congress had not intended *sub silentio* to preempt and thereby *weaken* governmental rights against those not expressly affected by the act but had instead left the states to the more lenient common law regime. The CFA similarly strengthened the government's rights of forfeiture. In contrast to the facts of *Texas*, however, preemption by the CFA would not weaken any preexisting common law right of the government to conversion because *the government possessed no such right in this context*. The necessary hybrid action is created, if at all, only as an unforeseen byproduct of the CFA's relation-back provision. It is in fact the rejection of preemption that wreaks *sub silentio* changes in the common law by extending the reach of conversion to encompass transferred forfeited assets—thereby subjecting MZK to a post-CFA common law action that is more onerous than the statutory scheme or the pre-CFA common law. The relevant inquiry therefore is whether Congress, in strengthening the efficacy of criminal forfeiture through incorporation of the relation-back fiction, inadvertently *and simultaneously* empowered the government to use a heretofore unavailable state law tort claim to evade the statutory limits placed upon that newly strengthened forfeiture authority.

III. BASING A COMMON LAW TORT CLAIM ON THE RELATION-BACK FICTION CONFLICTS WITH THIS COURT'S PRECEDENT.

The Fourth Circuit held that the *in rem* relation-back doctrine could establish the elements of an *in personam* state law conversion action. This decision directly conflicts both with this Court's interpretation of an analogous forfeiture statute in *United States v. Grundy and Thorn-*

burgh, 7 U.S. (3 Cranch) 337 (1806), and with the interpretation of the common law relation-back fiction adopted by this Court in *United States v. 92 Buena Vista Avenue*, 507 U.S. 111, 113 S. Ct. 1126 (1993) ("*Buena Vista*"), and by the Ninth Circuit in *CHoPP Computer Corp. v. United States*, 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, —— U.S. ——, 115 S. Ct. 63 (1994). Indeed, the fundamental incompatibility between the *in rem* relation-back fiction and the *in personam* liability of tort is such that the government has apparently not attempted to pursue a conversion action as an adjunct to forfeiture since the *Grundy* decision 190 years ago. The Fourth Circuit's interpretation of the statutory relation-back provision therefore upsets nearly two centuries of unchallenged precedent.

The Fourth Circuit's decision provides a breathtaking new weapon for the government's forfeiture arsenal. To sanction this sweeping new grant of power the Fourth Circuit conflated two distinct concepts—title and right to possession. It is fundamental that conversion "is concerned with possession, *not title*." 18 Am. Jur. 2d, Conversion § 75, at 198 (emphasis added); *see also id.* § 28, at 161. Yet, the Fourth Circuit concluded that the federal retroactive vesting of title through the relation-back provision of the forfeiture statute also creates a concomitant state retroactive right of immediate possession. The Fourth Circuit cited no cases supporting its theory that a cause of action for conversion can arise retroactively and ignored cases rejecting it. *See, e.g., CHoPP*, 5 F.3d at 1349 (retroactive vesting of interest pursuant to constructive trust theory held not to support subsequent conversion action). Indeed, the court offered no explanation as to how the fiction of relation-back can retroactively create an "immediate" right.

The right to possession is alien to the relation-back fiction's purpose of transferring full ownership to the government at the time the forfeiture order is entered. The Fourth Circuit's holding, however, treats the retroactive vesting provision of 21 U.S.C. § 853(c) as if it were a

self-executing vesting provision. The Fourth Circuit thus relied on a theory that has been expressly rejected by this Court in *Buena Vista*. *See* 507 U.S. at 131, 113 S. Ct. at 1138 (Scalia, J. concurring) (rejecting the "fundamental misconception that, under the common-law relation-back doctrine, all rights and legal title to the property pass to the United States 'at the moment of illegal use' "). In doing so, the Fourth Circuit held that a forfeiture order not only can retroactively divest a third party of title, but also—years after the fact—turn an act of possession, innocent when done, *nunc pro tunc* into a wrongful act resulting in tort damages. This Court in *Buena Vista*, however, held that "[u]ntil the Government [wins a judgment of forfeiture], someone else owns the property. . . . [and] may therefore invoke any defense available to the owner of the property before the forfeiture is decreed." 507 U.S. at 127, 113 S. Ct. at 1136. Surely one defense to a claim of conversion is to assert one's own ownership and concomitant right to possession of the property in question during the period of the alleged conversion.[11]

Even more fundamentally, the *in rem* relation-back fiction cannot be the basis for *in personam* tort liability. Relation-back evolved from the ancient fiction underpinning the English common law of forfeiture—that forfeitable property had itself committed a wrong that rendered it subject to the punishment of the crown. This wrong, whether in the origin of the property, or in its character, or in the use to which it was put, "tainted" not the property's owner *but the property itself*, symbolically imbued by the law with the attributes of humanity. Thus, subsequent transfers of ownership could not cure this symbolic "taint" upon the property, nor could such transfers defeat the government's corresponding right to "punish" the property through forfeiture. Just as the commission of a

[11] *Compare Counihan v. Allstate Ins. Co.*, 25 F.3d 109 (2d Cir. 1994) (holding that the forfeiture of a house cannot retroactively divest the homeowner of the right to collect insurance on that house because "not every right of the owner is lost by virtue of the relation-back of title").

crime vested the government with authority to punish a felon, so too the government's authority to punish property originated with the taint. Title, once placed in the government by forfeiture, therefore "related back" to that point in time. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-89, 94 S. Ct. 2080, 2090-94 (1974); *United States v. Sandini*, 816 F.2d 869, 871-73 (3d Cir. 1987).

Relation-back thus was from the beginning a fictional creature of *in rem* jurisdiction that "attache[d] to the thing itself, not to any article for which the thing may [have] be[en] exchanged." *See Grundy*, 7 U.S. (3 Cranch) at 354; *see also Buena Vista*, 507 U.S. at 125, 113 S. Ct. at 1135 (plurality opinion) ("[W]e are not aware of any common-law precedent for treating proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture."). The *in personam* liability of tort, in contrast, looks not to the "thing" but to the personal actions of the defendant. There is simply no authority to support the proposition, nor logical reason to conclude, that the *in rem* principle of relation-back can somehow operate to "taint" the character of an individual's admittedly lawful acts after such acts occur.

In *Grundy*, a case whose facts are remarkably similar to the one at bar, Chief Justice Marshall held that the government had no right to pursue, as an adjunct to a forfeiture action, the value of forfeitable property from third parties by means of a conversion-type action founded upon the relation-back fiction.[12] The defendants Grundy and Thornburgh were the assignees in bankruptcy of the property of one Aquila Brown, formerly a merchant and shipowner. One of Brown's ships, the *Anthony Mangin*, was sold by Grundy and Thornburgh to offset Brown's debts. It was later learned, however, that Brown had lied

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[12] Chief Justice Marshall's discussion of the relation-back doctrine still accords with this Court's modern analysis of the issue. *See Buena Vista*, 507 U.S. at 125, 113 S. Ct. at 1135 (plurality opinion) (adopting Chief Justice Marshall's explanation of when forfeiture vests); *id.* 507 U.S. at 126, 113 S. Ct. at 1136.

under oath to register the *Anthony Mangin*. *See* 7 U.S. at 349-50. Under the operative statute, such a falsehood entitled the government either to seek forfeiture of the ship or to obtain the value of the ship *from the person who perpetrated the lie*. *See id.* The government pursued neither statutory alternative but sued Grundy and Thornburgh to gain from them what it could not from the bankrupt Brown. The government framed its suit in *Grundy* as an "action on the case"—the form of pleading from which the tort of conversion later developed. While acknowledging that the operative statute did not support its common law action against the defendants, the government argued, as it argued here, that the statute's limitations did not circumscribe its rights at the common law.

After noting that the government's common law rights were in fact dependent upon the construction of the statute, *see id.* at 351, Chief Justice Marshall rejected the common law claim as a matter of law:

> Has the doctrine of relation such an influence upon this case . . . so as by this fiction of law to make [the United States] the real owners of the vessel at the time of sale, and consequently of the money for which she was sold?
>
> Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. . . . Suppose, instead of being sold by the defendants, [the Anthony Mangin] had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable by the doctrine of relation in lieu of the Anthony Mangin?—Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

Id. at 354.

The result reached below departs from this settled understanding of the operation of the relation-back fiction by assuming that tort liability is created through a mechanism intended to alter retroactively the ownership of title. Chief Justice Marshall did not permit such a claim in *Grundy*. It should not be allowed to stand here.

CONCLUSION

For the foregoing reasons, Moffitt, Zwerling & Kemler, P.C. respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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